



August 25, 2023

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VIA E-MAIL

LISA CALLIF

CHRIS PEREZ

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Senate Committee on the Judiciary
Subcommittee on Intellectual Property
Attn: Michelle Ankenbrand & Aaron Stanislawski
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HERLINDA CASTAGNOLI

JONATHAN FISHER

ERIC FRAM

**RE: ARTIFICIAL INTELLIGENCE AND INTELLECTUAL
PROPERTY – PART II: COPYRIGHT HEARING ON JULY 12, 2023 /
FEDERAL RIGHT OF PUBLICITY**

MADISON KARSENTY

NATALIE LOCKE

MARK MILSHTEYN

Dear Members of the Subcommittee on Intellectual Property:

JOSH NEUBARTH

SARAH SCHWARZMAN

JAMIE SHEPARD

JACQUELINE SWETT

ALEX YOUSEFZADEH

We represent the concerns of Film Independent and the International Documentary Association (IDA). Film Independent is a tax-exempt membership organization with 7,800 members, mostly located in California and New York, the vast majority of which are active, independent filmmakers of both scripted films and documentaries. The IDA is a tax-exempt membership organization with over 3,112 members, the majority of which are in the United States with 411 members in other countries. The vast majority are active independent documentarians making films for theatrical release, traditional television, and streaming services.

While the MPA represents the major film studios and Netflix, Film Independent and IDA members are indie filmmakers, who comprise a significant segment of the film industry. The total box office for domestic box office was \$5.83 billion. The independent segment of the North American domestic box office reached \$1 billion year-to-date in July. This high dollar figure and large percentage of the total domestic box office was fueled in large part from two indie film successes. *Sound of Freedom*, with a domestic revenue of over \$164.0 million, opened on 2,634 screens and widened to 3,411 screens in July. The \$5.0 million budgeted *Talk to Me* opened on 2,340 screens and has a current revenue of over \$22 million.

It has come to the attention of both IDA and Film Independent that during the hearings on July 12, 2023 before the Senate Committee on the Judiciary's Subcommittee on Intellectual Property (advertised as intended to discuss Artificial Intelligence and Intellectual Property), four of the five witnesses made a strong pitch for something quite different and potentially quite dangerous to the members of the two organizations we represent in writing this letter. These witnesses proposed a national right of publicity law which we believe is a good idea. However, the witnesses urged the committee to provide that the breach of the right of publicity also could occur by uses in creative works.

We support the implementation of a federal right of publicity. However, the extension of right of publicity to include creative works as discussed at the Senate Judiciary hearing on July 12, 2023 would have a disastrous impact on artists' rights under the First Amendment. Such an exception prohibits filmmakers from producing films that contain references to real individuals without first obtaining that individual's consent. Such a requirement would effectively chill artists' freedom of speech and only allow for the creation of expressive works about individuals that the individuals deem favorable. At the very least, the creation of any federal right of publicity must explicitly exempt expressive works to ensure artists' First Amendment rights are protected.

Stated generally, the right of publicity is the inherent right of every individual to control the commercial use of his or her identity.¹ A plaintiff's "identity" has traditionally encompassed their name, likeness, voice, and signature. Although there is no federal right of publicity, twenty-two states recognize a statutory right of publicity and seventeen states recognize the right under common law. Even more states recognize a similar cause of action through the tort of invasion of privacy by appropriation under which a plaintiff can recover for a defendant's unpermitted use of plaintiff's identity with damage to plaintiff's dignitary interests and peace of mind.²

However, even in states that have established a right of publicity or similar cause of action, a majority of these states have recognized that an individual's right of publicity must not infringe upon the public's right of free speech under the First Amendment and explicitly exclude creative works from the coverage of the right of publicity.

For example, Nevada's right of publicity statute prohibits any "commercial use by another of the name, voice signature, photograph or likeness of a person" without that person's consent.³ However, the statute also states that the prohibition is inapplicable if the use is "an attempt to portray, imitate, simulate or impersonate a person in a play, book, magazine article, newspaper article, musical composition, film, or a radio, television or other audio or visual program, except where the use is directly connected with commercial sponsorship."⁴

Likewise, California courts have also carved out an expressive works exemption for its common law right of publicity.⁵ In *DeHavilland v. FX Networks, LLC*, California's Second District Court of Appeal explicitly held that the First Amendment protects expressive works such as films, plays, and television.⁶ "Whether a person portrayed in one of these expressive works is a world-renowned film star—a living legend—or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve,

¹ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1.3 (2d ed. 2010).

² MCCARTHY, *supra* note 1 at § 1.23.

³ NEV. REV. STAT. § 597.790

⁴ *Id.*

⁵ While California's statutory right of publicity under CAL. CIV. CODE § 3344 also contains an exemption for expressive works, this exemption is limited to individuals who are deceased.

⁶ *DeHavilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 849-50 (2018).

disapprove, or veto the creator's portrayal of actual people.”⁷

An exemption for expressive works within the right of publicity is necessary to ensure adherence to the principles underlying the First Amendment and “safeguard[] the storytellers and artists who take the raw materials of life – including the stories of real individuals, ordinary or extraordinary—and transform them into art”⁸ For nearly as long as films have been made, those films have been used to tell stories of historical significance and of public importance. As recognized by the Supreme Court of California in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, creations do not “lose their constitutional protections because they are for the purposes of entertaining rather than informing . . . [E]ntertainment as a mode of self-expression, is entitled to constitutional protection irrespective of its contribution to the marketplace of ideas. ‘For expression is an integral part of the development of ideas, of mental exploration, and of the affirmation of self.’”⁹

The fear that a federal right of publicity will wreak havoc among the artistic community is not hypothetical; the implementation of a right that does not explicitly exempt expressive works would have immediate negative consequences. Our firm of 15 lawyers, Donaldson Callif Perez LLP, represents hundreds of filmmakers and artists each year. All of them rely on the First Amendment to protect their right to create art that tells stories about our world. Oftentimes, these stories involve real people and real events. Our clients’ works are regularly nominated for Academy Awards and five of these films have won the Academy Award for Documentary Feature Film: *20 Feet from Stardom* (2013), *Icarus* (2017), *Free Solo* (2018), *American Factory* (2019), and *Summer of Soul* (2021). Each of these films depict private and public individuals’ names and likenesses and would have been significantly and negatively impacted by a federal right of publicity that does not provide a carve out for filmmakers.

If the legislature chooses to enact a federal right of publicity, the right must explicitly create a carve out for expressive works to ensure its Constitutionality.

We are available to assist in any way possible as the committee deals with the request for a federal right of publicity. We thank you for your time and attention to this important matter.

Respectfully,



MICHAEL C. DONALDSON

MCD/vr

bcc: Lisa Callif, Dale Nelson, Chris Perez, Ben Sheffner, Seth Horowitz

⁷ *Id.* at 850.

⁸ *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016).

⁹ *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 35 Cal. 4th 387, 398 (2001) (citing *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 867 (1979)).